

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1488

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellees,

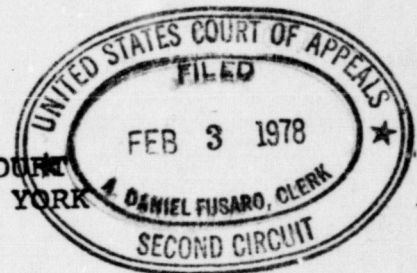
-against-

JAMES ARTHUR LEPORE and
GUISEPPE DeVIVO,
Defendants-Appellants.

B p/s
Docket No. 77-1488

BRIEF FOR APPELLANT
JAMES ARTHUR LEPORE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JAMES ARTHUR LEPORE
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732 - 2971

JONATHAN J. SILBERMANN,

Of Counsel.

Table of Contents

Table of Cases and Other Authorities	i
Questions Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	
A. The Indictment	2
B. The Government's Case	3
C. The Defense Case	6
D. The Charge and Jury Deliberations	10
Argument	
Point I THE DISTRICT COURT'S FAILURE TO COMPEL THE GOVERNMENT TO MAKE AN ELECTION BETWEEN COUNTS TWO AND THREE AND THE SUBMISSION OF BOTH COUNTS TO THE JURORS, REQUIRES REVERSAL.	14
Point II THE PROSECUTOR'S IMPROPER CROSS-EXAM- INATION ABOUT APPELLANT'S POST-ARREST SILENCE REQUIRES REVERSAL	19
Conclusion	23

Table of Cases

<u>Doyle v. Ohio</u> , 426 U.S. 610 (1976)	19, 20, 21
<u>Milanovich v. United States</u> , 365 U.S. 551 (1961)	18
<u>Riggs v. United States</u> , 280 F.2d 750 (5th Cir. 1960)	18
<u>Stewart v. United States</u> , 366 U.S. 1 (1961)	22
<u>United States v. Anderson</u> , 498 F.2d 1038 (D.C. Cir. 1974)	
<u>affirmed sub nom. United States v. Hale</u> , 422 U.S.	21, 22

<u>United States v. Hagan</u> , 487 F.2d 897 (5th Cir. 1973)	10
<u>United States v. Hairrell</u> , 521 F.2d 1264 (6th Cir.), <u>cert. denied</u> , 423 U.S. 1035 (1975)	14
<u>United States v. Hale</u> , 422 U.S. 171 (1975)	19, 20
<u>United States v. Hyatt</u> , 565 F.2d 229 (2d Cir. 1977)	18
<u>United States v. Ketchum</u> , 320 F.2d 3 (2d Cir.), <u>cert. denied</u> , 375 U.S. 905 (1963)	14, 17
<u>United States v. Rose</u> , 500 F.2d 12 (2d Cir. 1974), <u>vacated and remanded</u> , 422 U.S. 1031 (1975), <u>on remand</u> , 525 F.2d 1026 (2d Cir. 1976)	21
<u>United States v. Universal C.I.T. Credit Corp.</u> , 344 U.S. 218 (1952)	14
<u>United States v. Wilkerson</u> , 469 F.2d 963 (5th Cir. 1972) ..	18

Other Authorities

1 Wright, Federal Practice and Procedure, §142 (1969 ed.) .	14
8 Moore's Federal Practice ¶8.07[1] (2d ed. 1977)	14
18 U.S.C. §371	3
18 U.S.C. §472	3, 6, 10, 15, 18
18 U.S.C. §473	2, 3, 15
18 U.S.C. §495	18
18 U.S.C. §3651	2
Rule 29 of the Federal Rules of Criminal Procedure	6

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
:
UNITED STATES OF AMERICA,
:
:
Plaintiff-Appellee,
:
:
-against-
:
:
JAMES ARTHUR LEPORE and
:
GUISEPPE DEVIVO,
:
Defendants-Appellants.
:
-----X

Docket No. 77-1483

BRIEF FOR APPELLANT
JAMES ARTHUR LEPORE

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the District Court's failure to compel the Government to make an election between Counts Two and Three and the submission of both counts to the jurors, requires reversal.
2. Whether the prosecutor's improper cross-examination about appellant's post-arrest silence requires reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Richard Owen) rendered on November 4, 1977, after a jury trial, convicting appellant James Arthur LePore, of selling counterfeit Federal Reserve Notes in violation of 18 U.S.C. §473 (Count Three).

Pursuant to 18 U.S.C. §3651 appellant was sentenced to a two-year term of imprisonment with four months to be served in a jail-type institution. Execution of the remainder of the sentence was suspended, and appellant placed on probation for that period of time.*

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment**

On May 2, 1977, an indictment was filed charging appellant and co-defendant Guiseppe DeVivo with conspiring on or about March 1, 1977 to sell counterfeit \$100 Federal Reserve Notes in

*Appellant LePore remains on bail pending determination of this appeal.

**The indictment is reproduced as "B" to appellant's separate appendix.

violation of 18 U.S.C. §§472, 473 (Count One) (18 U.S.C. §371) and with the actual sale of 98 of those notes on that date (Count Two) (18 U.S.C. §§472,2); (Count Three) (18 U.S.C. §§473,2). Counts Two and Three read as follows:

COUNT TWO

The Grand Jury further charges:

On or about March 1, 1977, in the Southern District of New York, JAMES ARTHUR LePORE and GUISEPPE DeVIVO, the defendants, unlawfully, wilfully and knowingly, and with intent to defraud, did sell and attempt to sell and did keep in their possession and conceal falsely made, forged, counterfeited and altered obligations and other securities of the United States, to wit, approximately 98 counterfeited \$100 Federal Reserve Notes.

COUNT THREE

The Grand Jury further charges:

On or about March 1, 1977, in the Southern District of New York, JAMES ARTHUR LePORE and GUISEPPE DeVIVO, the defendants, unlawfully, wilfully and knowingly did sell, transfer, receive and deliver certain false, forged, counterfeited and altered obligations and other securities of the United States, to wit, 98 counterfeited \$100 Federal Reserve Notes, with the intent that the same be passed, published and used as true and genuine.

B. The Government's Case

Robert Della Porta* testified that he first met co-defendant DeVivo in July, 1976 (28, 129-130). Subsequently, they

*Della Porta had previously entered a guilty plea to conspiring to possess and distribute three counterfeit \$100,000 Treasury bills in March, 1975 (24). Numerals in parentheses refer to pages of the trial transcript.

discussed the "sale of securities" (28-33, 132, 140-141), and in September or October of that year, Della Porta told DeVivo that a movie producer, known to Della Porta, was interested in obtaining \$2,000,000 worth of securities to be used as collateral for a production. A meeting was held in mid-December,* attended by Della Porta, co-defendant DeVivo, Mr. Kobe Jaeger, a movie producer, and John Vezzeris, a Secret Service agent, acting undercover as Mr. Jaeger's assistant (36, 147). Before the meeting, Della Porta met DeVivo in front of Jaeger's office building at 47th Street and Broadway. Although appellant arrived with DeVivo, appellant did not attend the meeting, remaining outside (35, 39, 76-77).**

According to Della Porta, the participants at the meeting discussed the sale of \$2,000,000 worth of Treasury bills, and the terms of purchase were arranged (36-38, 147, 151). Della Porta indicated that after several conversations and one more meeting with DeVivo, none of which were conducted in appellant's presence,*** (40-43), the co-defendant offered to sell "currency notes" to supply Jaeger's needs (43-44). After further discussions, in February, 1977, DeVivo gave Della Porta a \$100 bill as a sample (50-51), and a short time thereafter

*A prior meeting had been arranged, but DeVivo failed to attend (34).

**Agent James F. Gilmartin testified that during the meeting appellant spent one hour eating in a nearby Zum Zum's restaurant (244).

***It is undisputed that appellant was not present at the meeting (42).

Della Porta ordered \$10,000 worth of the bills (51), which the co-defendant said he would deliver "some time in the afternoon" of March 9, 1977 (83-84, 52).

Later that afternoon, appellant -- whom Della Porta had previously seen driving the co-defendant (75-76)* -- arrived at Della Porta's office. Inside, in response to Della Porta's demand, appellant gave him a sealed envelope, which, according to Della Porta, contained 98 \$100 bills.** (54, 85-86, 88-89, 91, 162). Della Porta testified that after opening the envelope and removing the money, he gave \$800 in genuine currency to appellant, who then left (54, 91-92). According to Della Porta, approximately two weeks later, he ordered \$100,000 worth of bills from the co-defendant and asked the co-defendant to make delivery at a construction site near the International House of Pancakes on Rockaway Boulevard in Queens, New York, where Della Porta then worked. On March 30, 1977, appellant drove DeVivo to that restaurant (55-56, 193, 369).

There, during breakfast DeVivo told Della Porta that he had a "package" for him (56-57). While appellant remained inside the restaurant eating his breakfast (97), DeVivo and Della Porta went to the trunk of appellant's car from which the co-

*Della Porta indicated that he first met appellant at a job site where Della Porta was working (71).

**Agent Gilmartin testified that these bills were counterfeit (242), and it was stipulated that two of appellant's fingerprints appeared on the outside of the envelope (298).

defendant removed two boxes which he then gave to Della Porta (57, 96-97, 163-164). One of the boxes contained \$100,100 in counterfeit \$100 bills* (280-283).**

At the close of the Government's case, defense counsel, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, moved to dismiss the charges. Specifically, counsel argued that dismissal of Count Two was required because the statute upon which Count Two was based -- 18 U.S.C. §472 -- was "designed to punish an individual who attempts to pass counterfeit bills as genuine bills" (309) to an unsuspecting recipient, and the Government's proof, even if believed, failed to show this element. Alternatively, defense counsel contended that Counts Two and Three, in light of the proof adduced, were duplicative, and that the Government should therefore be compelled to elect which count to submit to the jury (305-306). The District Court denied the motion to dismiss and reserved decision on whether to require the Government to elect (308).

C. The Defense Case

Appellant LePore testified in his own behalf, explaining that after returning from Florida at the beginning of December

*Agent George Magee testified that the money in the box was counterfeit (280-283). The other box contained a Farberware grill (57).

**Portions of Della Porta's testimony were corroborated by various agents, who either observed the events in question (Orizzi, 187-195, 206, 209; Gilmartin, 229-234, 236-237, 243-246, 249, 262-264) or participated in them (Vezeris, 168-178).

1976, he began working for co-defendant DeVivo in DeVivo's wholesale merchandise business (338-340, 378). Appellant stated that he was employed as the co-defendant's driver and also delivered and returned merchandise for the business.* In that capacity appellant used his personal car (340-342, 363, 385-386, 408, 427). Appellant indicated that he met Mr. Della Porta approximately five times (344-347, 350-352, 363-366), and confirmed that he drove co-defendant DeVivo to the Jaeger meeting and that he did not attend, but remained in a restaurant nearby (347-348, 384, 437-438).

Appellant explained that on March 9, 1977, he was asked by DeVivo to deliver to Della Porta a sealed envelope, which, the co-defendant said, contained \$1,000 owed to Della Porta (355-358, 381). Appellant delivered the envelope, which Della Porta opened (360-362, 382, 439-440). Appellant testified that he was then given another sealed envelope,** containing documents which, Della Porta indicated, pertained to the sale of construction equipment*** (362, 382).

*Appellant was paid on a per diem basis (427).

**Agent Orrizzi had testified in the grand jury that he saw appellant and Della Porta exchange envelopes (202-203), and that he recognized the envelope given to appellant as one containing currency, which the agent had previously given to Della Porta (202-204, 548-550). At trial, Orrizzi disavowed this prior testimony, asserting that he had been mistaken (549-552).

***In appellant's presence, Della Porta and DeVivo had discussed the rental or sale of construction equipment (two machines) owned by a Mr. Joseph Giancarlo (347, 352-353, 372). Mr. Giancarlo confirmed that he had authorized DeVivo to sell the machines (319-324) and indicated that Della Porta had agreed to pay \$1,000 to transport one of the machines (322-323).

Appellant confirmed that on March 30, 1977, he drove DeVivo to the International House of Pancakes in Queens, where they had breakfast but denied that he saw the box containing counterfeit money (370). At the restaurant Della Porta and the co-defendant discussed the possible purchase of construction equipment and other business dealings (372-373, 389, 444-445). Appellant stated that he never participated in any discussions dealing with counterfeit currency or Treasury bills (375, 381) and never discussed that subject with the co-defendant (379).

On cross-examination, the prosecutor asked appellant the following questions:

Q: Do you recall after your arrest being interviewed by agents of the Secret Service?

A: I guess I was, what you would call it, being interviewed, yes.

Q: You never told them you were a driver, did you?

(408).

After appellant answered that he had told the agents, he was a salesman (409) and the Assistant United States Attorney had questioned appellant about his prior employment, the prosecutor asked:

"Isn't it a fact that you refused to tell the agents -- "

(410).

Defense counsel objected, and a side-bar ensued at which counsel requested a mistrial based on the questions relating to appellant's silence. Trial counsel for appellant stated:

I would move for a mistrial because I submit this was a bad faith question and Miss Parver is aware of the policy in the office and aware of the principles of the law that apply and aware [that] no inference can be drawn from a refusal to answer a particular question.

(411).

The prosecutor replied that she was "entitled to get an answer right now" (412). The District Court denied a mistrial but, in accordance with appellant's alternate request (412), instructed the jurors in the following language:

Ladies and gentlemen, in connection with this last series of questions having to do with inquiry of Mr. LePore at the time of his arrest, I want to advise you that at such a time a person who has just been arrested obviously has no duty to say anything to anybody, has a right not to say anything to anybody and has no duty to say anything and obviously no inference can be drawn from the fact that at that time something is not said or a question is not answered and even if a person chooses to answer one question and not answer another question, there is no inference that may be drawn from that fact and I instruct you that, to apply that to this case and the evidence that we are hearing.

(414).

At the conclusion of this instruction, appellant, in response to the prosecutor's questioning, testified that after his arrest he had been advised of his right not to answer (415).*

*The co-defendant also testified in his own behalf. He stated that he met Della Porta in the summer of 1976 and that they had various meetings where the sale and rental of two pieces of construction equipment were discussed (463, 469-475, 485, 497-498, 512). Further, DeVivo testified that Della Porta paid him \$1,000 to transport one of the machines; that the machine was never sent; and that on March 9, 1977, appellant LePore returned the money in a sealed envelope (480-485, 518-519).

Prior to summation, appellant's defense counsel renewed the earlier motion to compel the Government to elect which of the substantive counts to submit to the jury. The District Court denied the motion stating:

These motions are denied and I am going to deny the motion to compel election on the part of the government as between counts 2 and 3 on the basis of an authority which is cited in 487 Fed. 2d 897 [United States v. Hagan, 487 F.2d 897 (5th Cir. 1973)]. That's in the Fifth Circuit, but it seemed to address their point right on the nose.

Mr. Lipson, [defense counsel] your reading of those cases makes eminently good sense, but the Fifth Circuit that has addressed this case, this problem squarely has held that if there is an intention to defraud somebody even way down the line, that is the intent that is required in what is [18 U.S.C.] §472 and inasmuch as the Appellate Courts have so held, I feel constrained to follow them.

(566).

D. The Charge* and Jury Deliberations

Over the defense's renewed objection (714), the District Court submitted both Counts Two and Three to the jurors for their determination.

After telling the jurors that in order to convict appellant of conspiracy, they were required to find that appellant agreed to violate the federal counterfeiting laws and that an overt act had been committed (728),** the judge charged the jurors as

*The complete charge is "C" to appellant's separate appendix.

**The judge also instructed the jurors that they were required to find that each defendant knowingly associated with the conspiracy (728).

to the necessary elements of Counts Two and Three. With respect to Count Two, he told the jurors that the following elements were required for conviction:

First, that on or about the first day of March, and I have already charged you about the variation here in dates, on or about the first day of March in the Southern District of New York, the defendant you are considering did willfully sell or attempt to sell or possess or conceal the 98 particular purported Federal Reserve notes in question.

Second, that the notes were counterfeit.

Third, that the defendant knew the notes were counterfeit.

Fourth, that the defendant acted with intent to defraud.

(738-739).

The District Court defined the specific intent necessary as "an intent that at some time in the future some one or more persons would be defrauded by the use of these counterfeit notes, that is, they would be given one or more of these counterfeit notes as payment for something, or would be told the notes were true and genuine or would deal with the notes in some way under the mistaken assumption that they were true and genuine, without knowing that they are counterfeit." (741-742).

To convict on Count Three, which the district judge described as "rather similar to Count 2" (745), the judge instructed the jurors that they were required to find:

four elements: first, that on or about March 1, 1977, in the Southern District of New York, the defendant did willfully, sell, transfer, receive or deliver approximately \$9800 in \$100 federal reserve notes or aid

and abet another to do so.

I want to say to you it is sufficient for the government in this case to prove beyond a reasonable doubt that the defendant did either sell or exchange or transfer or receive or deliver. It need only prove one of those acts,

Second, that the notes were counterfeit.

Third, that the defendant knew the notes were counterfeit, and fourth, that the defendant intended that the notes would be passed, published, or used as true and genuine.

(745-746).

As to the fourth element, the judge told the jurors that to convict they had to find that appellant acted:

... with the intent that the notes be passed, published, or used as true and genuine.

That means that with an intent at some time in the future the note or notes would be passed to one or more members of the public who would deal with them in the mistaken belief that they were true and genuine.

(747).

The jurors deliberated during the afternoon of September 21, 1977, recessing for a religious holiday. Deliberations resumed on September 23. After re-reading testimony and deliberations, in the afternoon of that day, the jurors found co-defendant DeVivo guilty as charged and appellant not guilty of conspiring to violate the counterfeit laws (769). As to the remaining counts, the foreman indicated that the jury was deadlocked, stating:

We reached an impasse. There was no give or take....

(770).

The District Court then gave an "Allen" charge (771-775). Approximately two hours later, the jurors found appellant not guilty on Count Two and guilty on Count Three (782).

ARGUMENT

POINT I

THE DISTRICT COURT'S FAILURE TO COMPEL THE
GOVERNMENT TO MAKE AN ELECTION BETWEEN
COUNTS TWO AND THREE AND THE SUBMISSION OF
BOTH COUNTS TO THE JURORS, REQUIRES REVERSAL.

At the close of the Government's case and again prior to summation, defense counsel contended that, in light of the proof at trial, the substantive counts in the indictment were duplicative. Counsel therefore argued that the Government be compelled to elect which one of the two counts should be submitted to the jury. This motion was denied and over defense objection, the District Court submitted both Counts Two and Three for the jurors' determination. Because counsel's position with respect to the requirement of election was correct, and the submission of both counts erroneous, a new trial must be granted.

When a single offense is charged in separate counts, the error of multiplicity has been committed. United States v. Hairrell, 521 F.2d 1264, 1266 (6th Cir.), cert. denied, 423 U.S. 1035 (1975); 1 Wright, Federal Practice and Procedure, §142, p.306 (1969 ed.); 8 Moore's Federal Practice, ¶8.07[1] at 8-47 (2d Ed. 1977). In such circumstances, the Government is required to elect which count(s) to submit to the jury. United States v. Ketchum, 320 F.2d 3, 8 (2d Cir.), cert. denied, 375 U.S. 905 (1963); 8 Moore's ¶8.07[1], supra, at 8-51. See also, United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952).

In this case it is clear that the same offense in fact and law was charged in Counts Two and Three. Each required proof of a sale or delivery of counterfeit notes, knowledge that the notes were counterfeit, and the intent that the notes ultimately be given to an individual who would deal with them under the mistaken belief that they were genuine.

The jury instructions on each count were virtually identical.* The only possible element contained in Count Two, not

*A schematic of the elements of the substantive charges, as defined by the judge's charge, is as follows:

<u>Count Two, 18 U.S.C. §472</u>	<u>Count Three, 18 U.S.C. §473</u>
1. On March 1, 1977, the defendant did sell or attempt to sell or possess or conceal the counterfeit notes.	1. On March 1, 1977, the defendant did sell, transfer, receive or deliver the counterfeit notes.
2. The notes were counterfeit.	2. The notes were counterfeit.
3. The defendant knew the notes were counterfeit.	3. The defendant knew the notes were counterfeit.
4. The defendant acted with the intent to defraud, defined as an intent that some time in the future one or more persons would be defrauded by use of these counterfeit notes, that is, they would be given one or more of the notes as payment for something or would be told the notes were true and genuine or would deal with the notes in some way under the mistaken assumption that they were true and genuine, without knowing they were counterfeit.	4. The defendant intended that the notes be passed, published, or used as true and genuine, defined as an intent that at some time in the future the note or notes would be passed to one or more members of the public who would deal with them in the mistaken belief that they were true and genuine.

charged in Count Three, was that of possession. However, this alternative was meaningless in light of both the Government's theory of the case and the evidence produced in support of that theory at trial. The Government's theory, supported by Della Porta's testimony, was that on March 9, 1977, appellant had participated in a sale of \$9800 in counterfeit currency, by delivering the money in a sealed envelope to Della Porta. On summation, the Assistant United States Attorney relied on this testimony in arguing appellant's guilt:

You heard Mr. Della Porta tell you a few days later he calls Mr. DeVivo and he orders a batch of \$10,000 worth of counterfeit and you heard Mr. Della Porta then say that on March 9th Mr. LePore arrives and Mr. LePore handed Mr. Della Porta an envelope and Mr. Della Porta opened the envelope, ripped it open, took out some of the bills ...

(58', .

As the District Court recognized during trial:

...crediting the government's proof as one must at this point, the government's theory is going to stand or fall on the theory that there was a sale of \$9,800 for a thousand dollars, of which the undercover agent got a \$200 cut, so there is a sale or there isn't a sale, am correct about that? Nobody is claiming that the jury could find that

there had been possession without a sale here because the whole thing -- here they are and the thousand dollars was given for it. Either they will accept the story or they are going to reject it.

(307).

Thus, in light of the Government's theory of guilt and the proof adduced at trial, it was impossible to find a possession of the bills without a sale.

Moreover, the judge did not limit the instructions on Count Two to the charge of possession. Rather, he told the jurors that to convict, they were required to find in the alternative either a sale, an attempted sale, a possession or concealment. ("You need find that only one of them occurred" (740)). In any event, the jurors obviously did not rely on the charge of possession since they acquitted appellant on Count Two.

This Court has previously explained the need to require an election when multiplicatively occurs:

The reasons for requiring the Government to elect among counts in some cases are ... primarily those of promoting order and efficiency of the trial and avoiding the risk that 'the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes.'

United States v. Ketchum,
supra, 320 F.2d at 8.

These factors were present here, and the proper remedy was to require the Government to elect which substantive count to submit to the jurors. The failure to follow this procedure and the submission of both counts resulted in the jurors' inevitable

confusion and compromise, as a consequence of which they returned an obviously repugnant verdict.

Moreover, appellant's acquittal on Count Two did not cure the prejudice, since there is now no way of ascertaining the jurors' determination if, as required, an election had been made. Cf. Milanovich v. United States, 365 U.S. 551, 555 (1961) ("there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither)"). As a result, reversal and a new trial is necessary.*

*During trial, defense counsel contended that the Government failed to prove a violation of 18 U.S.C. §472, because it did not show that there had been an attempt to circulate any counterfeit currency by means of a representation that the money was genuine. Cf. United States v. Hyatt, 565 F.2d 229, 232 (2d Cir. 1977) (uttering under 18 U.S.C. §495 requires an "attempt to circulate the check by means of a fraudulent representation that it is genuine.") But compare United States v. Wilkerson, 469 F.2d 963, 969 (5th Cir. 1972); Riggs v. United States, 280 F.2d 750, 753 (5th Cir. 1960). However, this Court need not reach the question. Regardless of the specific elements required for conviction under 18 U.S.C. §472 and §473, since the District Court in fact interpreted the statutes to prohibit identical acts and instructed the jurors accordingly, the Government should have been required to elect which substantive count of the indictment to submit for determination.

POINT II

THE PROSECUTOR'S IMPROPER CROSS- EXAMINATION ABOUT APPELLANT'S POST- ARREST SILENCE REQUIRES REVERSAL.

At trial, it was conceded that on March 9, 1977, at the co-defendant's direction, appellant had delivered a sealed envelope to Robert Della Porta. Appellant claimed, however, that the delivery was made in the course of his employment as the co-defendant's driver and that he was unaware that the envelope contained counterfeit currency. In an effort to impeach this explanation by showing that appellant had failed to give the same explanation to the authorities after his arrest, the prosecutor, on cross-examination, asked whether appellant had ever told the arresting officers that he was the co-defendant's driver (408). After further questioning about appellant's prior employment, the Assistant United States Attorney then communicated to the jurors that appellant had remained silent after his arrest ("Isn't it a fact that you refused to tell the agents -- " (410)) and elicited that he had been advised of his right to remain silent (415). This cross-examination impermissibly exploited appellant's post-arrest silence, United States v. Hale, 422 U.S. 171, 180 (1975), and was so improper as to constitute a violation of due process. Doyle v. Ohio, 426 U.S. 610, 619-620 (1976).

In Hale, the Supreme Court flatly prohibited any questioning designed to impeach a defendant's credibility based on his custodial silence:

Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted.

United States v. Hale,
supra, 422 U.S. at 180.

As the Court subsequently explained in Doyle, where this type of questioning was held to be violative of due process,* the error is in posing any questions relating to post-arrest silence:

But the error we perceive lies in the cross-examination on this question [about post-arrest silence], thereby implying an inconsistency that the jury might construe as evidence of guilt. After an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right.

Doyle v. Ohio, supra,**
426 U.S. at 419.

* ... it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Doyle v. Ohio, supra,
426 U.S. at 618.

**Although no specific indication of reliance on Miranda rights is necessary, Doyle v. Ohio, supra, 426 U.S. at 619 n.10, such an indication existed here, since appellant admitted being given the warnings at his arrest. Indeed, the very basis of the Supreme Court's holding that cross-examination about post-

FOOTNOTE CONTINUES ON NEXT PAGE . . .

Immediately after the prosecutor questioned appellant about his post-arrest silence, defense counsel objected and requested a mistrial.* The District Court denied the mistrial, but instead told the jurors that after arrest appellant both had a right not to say anything and that no inference can be drawn from the failure to answer questions (414). This instruction, which was similar to that given in Hale,**

FOOTNOTE CONTINUED FROM PRECEDING PAGE:

arrest silence inherently violates due process is the possibility that such silence is, in fact, caused by a reliance on valid constitutional rights (see Doyle v. Ohio, supra, 426 U.S. at 619 n.10; compare Mr. Justice Stevens' dissent at 621-626) and that, despite any proffered explanation, the jurors will inevitably and impermissibly infer that custodial silence is inconsistent with an accused's trial testimony and an effort to hide the truth.

*The contemporaneous defense objection distinguishes this case from United States v. Rose, 500 F.2d 12 (2d Cir. 1974), vacated and remanded, 422 U.S. 1031 (1975), on remand, 525 F.2d 1026 (2d Cir. 1976). Rose involved a similar issue, but this Court declined to reach the issue, holding that the defendant "had waived his right to raise the issue on appeal by failing to make a contemporaneous objection at trial" United States v. Rose, supra, 525 F.2d at 1027. To the extent that Rose, supra, 500 F.2d at 17 indicates that a cautionary instruction is sufficient to cure the error, it is inconsistent with Hale and Doyle, and should be rejected.

**In Hale, the district court told the jurors that defendant Hale "was not required to indicate where the money came from ... You may disregard it, ladies and gentlemen." United States v. Anderson, 498 F.2d 1038, 1044 (D.C. Cir. 1974), affirmed sub nom. United States v. Hale, supra, 422 U.S. at 175 n.3.

did not cure the error. Indeed, the court of appeals in Hale, relying on Stewart v. United States, 366 U.S. 1, 10 (1961), found that such a cautionary instruction, by highlighting the error, only exacerbates it. United States v. Anderson, 498 F.2d 1038, 1044-1045 (D.C. Cir. 1974).

On the facts of this case, the prosecutor's improper questioning was not harmless, despite the judge's attempt to correct the error. The critical question here was appellant's knowledge of his co-defendant's counterfeiting schemes. As defense counsel explained during summation, the most important issue for the jurors' determination was "whether Mr. LePore was aware of what was going on and whether he knowingly and willfully and with a criminal intent took part in the distribution of the counterfeit money" (638). His explanation of the relationship with, and employment by, the co-defendant was critical to his defense, and his credibility obviously a key issue. The case was a close one. Appellant was acquitted of conspiracy. The jurors deliberated over two days, were deadlocked on the substantive counts, and they returned a patently repugnant verdict only after being given an Allen charge. (See Point I). The prosecutor's questioning was violative of well-established case law and principles of which she either was aware or should have been aware.* It

*Indeed, the obviousness of the error caused defense counsel to argue that the questioning was done in bad faith.

created unavoidable prejudice by impermissibly suggesting that appellant was lying because of his post-arrest silence. This error, which violated due process, requires reversal.

CONCLUSION

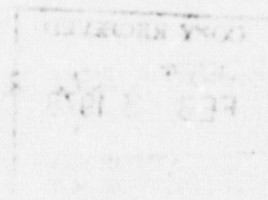
For the foregoing reasons, the judgment of the district court must be reversed and a new trial ordered.

Respectfully submitted,

MARTIN ERDMANN, ESQ.,
THE LEGAL AID SOCIETY
Attorney for Appellant
JAMES ARTHUR LEPORE
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

JONATHAN J. SILBERMANN,

Of Counsel.



COPY RECEIVED
ROBERT B. FISKE JR.
FEB 3 1978
U. S. ATTORNEY
SO. DIST. OF N. Y.